IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-774

BALTIMORE GAS AND ELECTRIC COMPANY, ET AL., AND THE BABCOCK & WILCOX COMPANY, *Petitioners*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., and THE STATE OF NEW YORK, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY MEMORANDUM FOR PETITIONERS

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This reply memorandum is being filed by petitioners[1] pursuant to Rule 24(4) of the rules of this Court, in response to a matter first raised in the Opposition of Respondents Natural Resources Defense Council, *et al.* to the petitions for certiorari in this and related cases (Nos. 76-653, 76-762, 76-769).

Respondents Natural Resources Defense Council, *et al.* (NRDC) attempt to distinguish this Court's opinion in *Kleppe* v. *Sierra Club*, ... U.S. ....., 96 S.Ct. 2718 (1976)

[1] Baltimore Gas and Electric Company, Boston Edison Company, Consumers Power Company, Duke Power Company, Long Island Lighting Company, Northeast Nuclear Energy Company, Pacific Gas and Electric Company, Philadelphia Electric Company, Public Service Electric and Gas Company, Southern California Edison Company, The Connecticut Light and Power Company, The Hartford Electric Light Company, Virginia Electric and Power Company, Western Massachusetts Electric Company and Yankee Atomic Electric Company, and The Babcock & Wilcox Company.

principally by arguing that the criteria proposed by the Nuclear Regulatory Commission (NRC) for use in interim licensing activities prior to completion of its generic GESMO rulemaking[2] are inherently deficient because they would inevitably exclude relevant GESMO issues. NRDC Br. in Opposition at 18-21. A central element in their argument (NRDC Br. in Opposition at 10, 14-15, 20) is that the NRC's memorandum decision in the *Big Rock Point* reactor licensing case, *Consumers Power Company* (Big Rock Point Nuclear Plant), CLI-75-10, 2 NRC 188 (August 11, 1975), necessarily precludes proper consideration of relevant GESMO issues in individual interim licensings.

NRDC's reliance on *Big Rock Point* is flatly misplaced. First, the order in that case issued on August 11, 1975—three months to the day before the November 11, 1975 notice which forms the basis of this lawsuit. It also was directed to one licensing amendment for one reactor, whereas the November 11 notice applied generally to all licensing of all recycle-related facilities. Thus *Big Rock Point* cannot be used either to illustrate or to qualify the November 11 notice as a statement of NRC policy, and the reliance of both NRDC and the Court of Appeals to this effect is simply unjustified.

Second, even if *Big Rock Point* were not inherently irrelevant to the issues in this case, it would still be completely distinguishable from it. *Big Rock Point* is a highly fact-dependent decision, in a situation where specific facts were crucial. In considering whether to permit the *Big Rock Point* proceeding to take place prior to completion of the GESMO proceeding, the Commission noted that the Big Rock reactor is one of the smallest currently operating re-

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[2] Generic Environmental Statement on Mixed Oxide Fuel, NRC Docket No. RM-50-5.

actors, and that it had already been using mixed uranium and plutonium oxide fuel successfully in its core for six years on an experimental basis. The action being considered by the Commission was authorization to increase the amount of plutonium in the fuel being used at the plant.

The Commission specifically found that the requested authorization "would not in any sense give rise to wide-scale use of mixed oxide fuel[;] would result in no unnecessary 'grandfathering'[; and would not] foreclose future safeguards options or future operational alternatives at the Big Rock facility."[3] 2 NRC at 190. It was under the highly specific circumstances of a licensing which the Commission found to have no generic impact, that it permitted a NEPA review of a "scope . . . tailored to the possible environmental impact resulting from increasing the amount of plutonium in this one reactor." *Id.*

Accordingly, the Commission concluded that the Big Rock Point licensing need not await completion of the generic GESMO proceeding or "cover the same ground being covered there, where the concern is with the *wide-scale* use of mixed oxide fuel." *Id.* (Emphasis in original.) Such tailoring of the scope and timing of proceedings in view of the circumstances actually posed by them is the process envisaged by this Court in *Kleppe, supra,* ..... U.S. at ....., 96 S.Ct. at 2730 note 20, 2733 note 26.

In short, *Big Rock Point* governs only the "unique circumstances," 2 NRC at 191, addressed by it. The case, most certainly, cannot be used to support the proposition that all arguably generic GESMO issues would necessarily be excluded, under the terms of the November 11 notice, from all individual interim licensing proceedings regardless of

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[3] Indeed, the Commission concluded, 2 NRC at 190, that the particular license amendment sought would not foreclose safeguards or operational alternatives, either at Big Rock Point or anywhere else.

the character or purpose of the facility or of the license being sought for it.[4]

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for certiorari, the petition should be granted.

Respectfully submitted,

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[4] Respondents' unsuccessful effort to predict the scope of future environmental analyses is apparently designed to demonstrate that interim licenses could be issued without adequate protection of the public. But as the Commission has repeatedly emphasized (*see, e.g.*, Memorandum for the United States at 10), no interim license could issue unless the provisions of the Atomic Energy Act and the National Environmental Policy Act, *inter alia*, were met, thus assuring that the public health and safety and the environment will be protected. Moreover, if any interim license is issued, judicial review can take place at that time, when the relevant environmental analysis, rather than respondents' speculation, would be before the Court.